California
Fair Political
Practices Commission

September 18, 1989

Shi-Ling Hsu
Folger and Levin
Embarcadero Center West
275 Battery Street, 23rd Floor
San Francisco, CA 94111

Re: Your Request for Informal Assistance
Our File No. I-89-485

Dear Mr. Hsu:

This is in response to your letter requesting assistance regarding the responsibilities of your client, EIP Associates, Inc., under the conflict-of-interest provisions of the Political Reform Act (the "Act").[1/] Since your advice request does not include all the material facts necessary to provide formal written advice, we are treating your question as a request for informal assistance pursuant to Regulation 18329(b)(8)(C)(copy enclosed).[2/]

QUESTIONS

1. (a) Is EIP Associates, Inc., a consultant for the purposes of the disclosure and disqualification provisions of the Act?

(b) Are the employees of EIP Associates, Inc., consultants for the purposes of the disclosure and disqualification provisions of the Act?

2. If the employees of EIP Associates, Inc., are consultants to the city, may they participate in a decision that may have a foreseeable material financial effect on a source of income to EIP Associates, Inc.?

1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

2/ Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

1. (a) A consultant must be a natural person and cannot be a corporation. Consequently, EIP Associates, Inc., is not a "consultant" for purposes of the Act.

(b) The employees of EIP Associates, Inc., who work on the city's project may be consultants if they provide information, advice, recommendation or counsel to the city. However, if the employees function independently of agency control and direction, and possess no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel, they will not be consultants under the Act. Moreover, if the decision-making structure of the city concerning the environmental impact report is modified to provide for an independent substantive review and analysis by the city's experts, we believe the employees of EIP will not be consultants within the meaning of the Act. We do not have sufficient information about the relationship between the city and the employees of EIP Associates, Inc., to reach a conclusion with respect to this question. Please note, however, if the employees of EIP Associates, Inc., are consultants under the Act, they are required to file statements of economic interests.

2. Assuming the employees of EIP Associates, Inc., are consultants to the city, they are required to disqualify from participation in the preparation of the environmental impact report if there is a nexus between the purpose for which the employees receive income from EIP Associates, Inc., and the governmental decision. A nexus exists if the employees received income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.

FACTS

You are writing on behalf of EIP Associates, Inc. ("EIP"). EIP provides environmental impact studies and reports to its clients. In March of 1989, EIP was hired by a developer to do an initial site evaluation in connection with a development project. The developer paid EIP $6,000 for its services. EIP has no current relationship with the developer.

The city in which the development project is proposed is now contemplating retaining EIP to do an environmental impact report ("EIR") concerning the same project. The city and EIP have agreed on a fixed price for the services, which is not dependent on the approval of the developer's proposal. However, EIP has become concerned about the possibility of a conflict of interest with respect to the income received from the developer for the initial site evaluation and the provision of services to the city on the developer's project.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his official position to influence a governmental decision in which the official has a financial interest. A "public official" is defined in Section 82048 to include every member, officer, employee or consultant of a state or local government agency. Regulation 18700 (copy enclosed) defines "consultant" as follows:

> "Consultant" shall include any natural person who provides under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that "consultant" shall not include a person who:
>
> (A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation, or counsel independent of control and direction of the agency or any agency official, other than normal contract monitoring; and
>
> (B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.
>
> Regulation 18700(a)(2).

As you noted in your letter requesting advice, a "consultant," as defined in Regulation 18700(a)(2), must be a natural person and cannot be a corporation. Consequently, EIP is not a "consultant" under Regulation 18700 and thus, not a public official for purposes of the disclosure and disqualification provisions of the Act.

The employees of EIP who work on city projects, however, may be consultants (and, thus, public officials) if they provide information, advice, recommendation or counsel to the city, are subject to the city's control and direction, or possess authority with respect to any city decisions. (Regulation 18700(a)(2); Hayden Advice Letter, No. A-84-319, copy enclosed.)

Clearly, the employees of EIP will be providing information, advice, recommendation or counsel to the city with respect to the EIR. However, if the employees of EIP do not participate in the making of a governmental decision, they will still have no disclosure or disqualification responsibilities. (Section 82019(c); Regulation 18700(a)(2).) For example, where there is "significant intervening substantive review" of the employee's recommendations, they will not be participating in a governmental decision. (Regulation 18700(c); Leidigh Advice Letter, No. A-89-320, copy enclosed.)

However, the Commission has interpreted this exception narrowly. In the Kaplan Advice Letter (No. A-82-108, copy enclosed) we stated that a consultant participates in a decision, even if it is "reviewed" by several of his superiors, if those superiors rely on the data or analysis prepared by the consultant without checking it independently, if they rely on the professional judgment of the consultant, or if the consultant in some other way actually may influence the final decision.

You have not provided us with sufficient information about the relationship between the city and the employees of EIP in preparation of the EIR for the city to determine whether they are in fact consultants to the city. However, if the decision-making structure is modified to provide for an independent substantive review and analysis by the city's experts, we believe the employees of EIP would not be public officials within the meaning of the Act.

Conflicts of Interest

For the purposes of the remainder of this letter we will assume that the employees of EIP meet the definition set out in Regulation 18700(a)(2) and are consultants, and therefore public officials under the Act.[2/] As consultants to the city, the employees of EIP that provide consulting services to the city are prohibited from making, participating in making, or otherwise using their official position to influence a governmental decision in which they have a financial interest. (Regulations 18700 and 18700.1, copies enclosed.)

Section 87103 specifies that an official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

> (c) Any source of income aggregating two hundred fifty dollars ($250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

2/ In addition to disqualification responsibilities, consultants to the city are required to file Statements of Economic Interest pursuant to the city's conflict of interest code. Consequently you may wish to clarify the status of the employees if you believe they are in fact consultants.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103(c) and (d).

EIP employees are employed by EIP and presumably receive $250 or more in income for their services. Therefore, EIP employees may not participate in preparation of the EIR if it is foreseeable that the report will have a material financial effect on EIP.

You have provided no information concerning the financial impact of the report on EIP. If, however, EIP stands to gain or lose business depending on the recommendations in the report, then it is certainly foreseeable that there will be a financial effect upon EIP. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.) In such an event, it must be ascertained whether the financial effect will be "material," to determine whether EIP employees can prepare the EIR. Regulations 18702.1[3/] and 18702.2 (copies enclosed) set forth the criteria that apply in making this determination.

In addition, the employees of EIP will be required to disqualify if there is a nexus between the purpose for which the employees receive income from EIP and the governmental decision. A nexus situation exists if the official receives income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision. (Regulation 18702.1(d).) For example, if EIP's work on the site evaluation study included proposed steps to mitigate environmental concerns in the project, there would be a nexus between the purpose for which they received income from EIP and their work on the EIR. (Sprague Advice Letter, I-88-190, copy enclosed.) Under such circumstances, none of the employees of EIP who worked on the site evaluation study could participate in the preparation of the EIR. You have not provided us with sufficient information to determine whether the nexus situation applies in this case.

Finally, if the developer is considered a "source of income" to the EIP employees who will prepare the EIR they may not be able to participate in the preparation. (Section 87103(c).) You indicate that the developer paid EIP $6,000 for the performance of certain work at some time (presumably within 12 months) in the

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3/ Where EIP's economic interest is directly affected by recommendations in the EIR, see specifically subdivision (a)(1) of Regulation 18702.1. To determine whether the recommendations directly affect EIP, see subdivision (b) of Regulation 18702.1.

recent past. You also state that, of the EIP employees who are projected to work on the EIR, only one has an ownership interest in EIP, and that is 5 percent.

Section 82030 defines "income," in pertinent part as:

> ... a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale [or] gift.... Income ... also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater....

Based upon this definition, it appears that, for purposes of the Act, the developer is not a source of income to any of the EIP employees who are projected to work on the EIR. Except for the employee who had an ownership interest, none received any income from the developer. As for the employee with the ownership interest, his or her share of EIP was only 5 percent and not the 10 percent necessary for the developer's payment to constitute income under Section 82030. Therefore, even if the EIR may have a financial effect upon the developer, the developer is not considered a source of income to the EIP employees preparing it and the Act's conflict of interest provisions do not apply.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh
Enclosures

FOLGER & LEVIN

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1900 Avenue of the Stars, 25th Floor
Los Angeles, California 90067
Telephone (213)556-3700

August 15, 1989

VIA FEDERAL EXPRESS

Kathryn E. Donovan
General Counsel
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Dear Ms. Donovan:

On behalf of our client, EIP Associates, Inc. (the "Firm"), and pursuant to Government Code Section 83114, we request that the Fair Political Practices Commission ("FPPC") provide written advice concerning an issue which has arisen for the Firm under the conflicts of interest provisions of the Political Reform Act of 1974, §§ 87100 - 87103 of the California Government Code (the "Act").

The Firm is in the business of performing environmental impact studies, and generating Environmental Impact Reports ("EIR"), pursuant to the California Environmental Quality Act. A California municipality ("City") is interested in retaining the Firm to perform an EIR for a proposed development project ("Project"). If the Project receives the necessary approvals from the City, the Project will be developed by a private real estate developer ("Developer").

At the recommendation of the City, the Developer retained the Firm several months ago to perform an initial site evaluation in connection with the Project. The purpose of the preliminary evaluation was to determine whether any problems exist that might pose an insurmountable obstacle to the Project. The preliminary study was completed by the Firm and paid for by the Developer in March, 1989. The Firm received $6,000 from the Developer for the site evaluation study. Prior to being engaged by the Developer to conduct the preliminary evaluation for the Project, the Firm had never done work for or been compensated by the Developer. No ongoing relationship exists between the Firm and the Developer and no additional sums are due the Firm by the Developer.

The Firm will be paid by the City for the EIR and its payment will not be dependent in any way on the results of the EIR or on whether or not the Project is ultimately developed.

You may assume for purposes of responding to this letter that the preparation of the EIR would be considered to be "participating in making" a "governmental decision" (a "Decision") within the meaning of Section 87100 of the Act.

In the Firm's discussions with the City, the City's attorney questioned whether the Firm or the Firm employees involved in preparing the EIR would be considered "public officials" as defined in Section 82048 of the Act, so as to raise a potential conflict of interest situation under the Act. Our analysis of the relevant provisions of the Act and the regulations promulgated thereunder (the "Regulations") leads us to conclude that there is no conflict of interest situation involved, with respect to either the Firm or such employees.

The only basis on which the Firm would be encompassed within the definition of "public official" under Section 82048 of the Act would be if it were considered a "consultant" of the City. We have concluded that the Firm would not be considered a "consultant" within the meaning of Section 82048, and hence not a "public official." Title 2, Section 18700(a)(2) of the Regulations defines "consultant" as including only "natural persons." The Firm is a corporation and therefore cannot be considered a consultant. Since the Firm is not a public official, it would not be subject to the conflict of interest rules under the Act.

We are aware from reviewing summaries of the FPPC's advice in similar factual settings that the Firm's employees who will be involved in preparing the EIR for the City may be considered "consultants" within the meaning of Section 18700 of the Regulations. (See FPPC letter to Anne M. Russell, of San Luis Obispo, dated February 17, 1989, File Number A-88-484.) We also understand from the advice given in FPPC File Number A-88-484 that (1) Firm employees with a ten percent or greater ownership interest in the Firm must disqualify themselves under the conflict of interest rules in the Act if the Decision may have a materially adverse effect on either the Firm or a Firm client, and (2) Firm employees with less than a ten percent ownership interest are required to disqualify themselves if the Decision may have a materially adverse affect on the Firm, but need not disqualify themselves for a Decision affecting Firm clients.

Only one of the employees of the Firm who will be involved with the preparation of the EIR for the City has an ownership interest in the Firm. That person owns five percent of the Firm's outstanding capital stock. It is thus our understanding that none of the Firm employees involved in the

preparation of the EIR for the City need disqualify himself or herself from preparing the EIR based on the effect the Decision may have on the Developer (a former Firm client).

We have also concluded that because there are no circumstances under which the Decision could have a materially adverse effect on the Firm itself, the 5% shareholder and other employees who will be involved in preparing the EIR need not disqualify themselves. The Firm will be paid the same fee by the City for preparing the EIR regardless of the findings of the EIR or whether or not the Project is developed. The Firm has been paid in full by the Developer for the preliminary evaluation work previously conducted and no other relationship exists between the Firm and the Developer with respect to the Project or otherwise. Thus, we have concluded that the Decision cannot have a materially adverse affect on the Firm.

We discussed the foregoing by telephone with Margaret Ellison, Esq. of your staff and understand that she agrees with the foregoing analysis. We respectfully request that your office provide written advice pursuant to Section 83114(b) to confirm our conclusion that neither the Firm nor the Firm employees to be involved in the preparation of the EIR need disqualify themselves under the conflict of interest rules of the Act.

If you require any additional information, please contact the undersigned. Thank you for your consideration.

Very truly yours,

Shi-Ling Hsu

SLH:lm
cc: Teressa K. Lippert, Esq.
Brent Barnes

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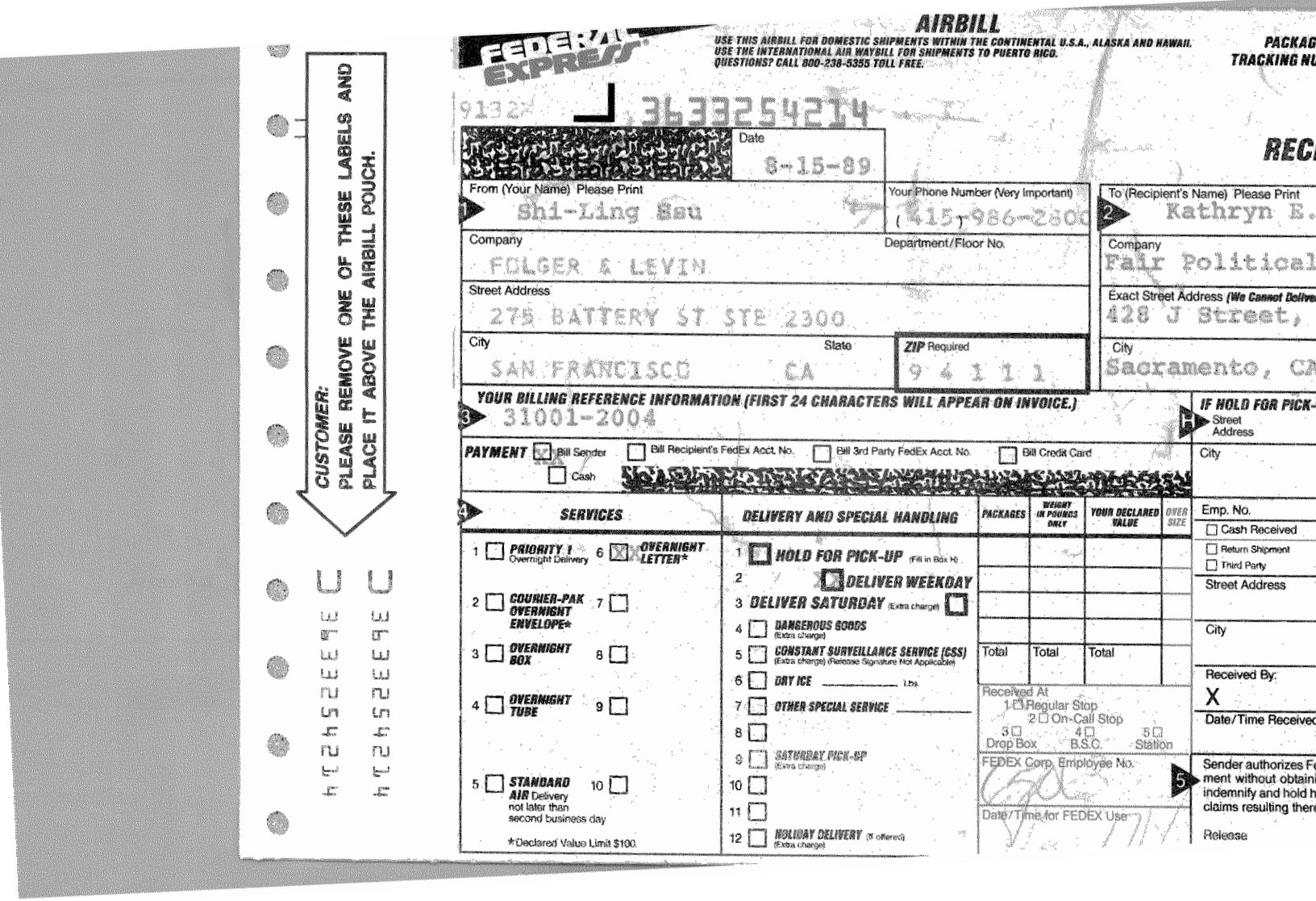

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Your Phone Number (Very Important): (415) 986-2800

Company: FOLGER & LEVIN
Department/Floor No.:

Street Address: 275 BATTERY ST STE 2300

City: SAN FRANCISCO
State: CA
ZIP Required: 9 4 1 1 1

2 To (Recipient's Name) Please Print: Kathryn E.

Company: Fair Political

Exact Street Address (We Cannot Deliver: 428 J Street,

City: Sacramento, CA

3 YOUR BILLING REFERENCE INFORMATION (FIRST 24 CHARACTERS WILL APPEAR ON INVOICE.)
31001-2004

4 PAYMENT: [X] Bill Sender [ ] Bill Recipient's FedEx Acct. No. [ ] Bill 3rd Party FedEx Acct. No. [ ] Bill Credit Card [ ] Cash

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City

5 SERVICES

1 [ ] PRIORITY 1 Overnight Delivery
2 [ ] COURIER-PAK OVERNIGHT ENVELOPE*
3 [ ] OVERNIGHT BOX
4 [ ] OVERNIGHT TUBE
5 [ ] STANDARD AIR Delivery not later than second business day
6 [X] OVERNIGHT LETTER*
7 [ ]
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10 [ ]
*Declared Value Limit $100.

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1 [ ] HOLD FOR PICK-UP (Fill in Box H)
2 [X] DELIVER WEEKDAY
3 [ ] DELIVER SATURDAY (Extra charge)
4 [ ] DANGEROUS GOODS (Extra charge)
5 [ ] CONSTANT SURVEILLANCE SERVICE (CSS) (Extra charge) (Release Signature Not Applicable)
6 [ ] DRY ICE ____ Lbs.
7 [ ] OTHER SPECIAL SERVICE
8 [ ]
9 [ ] SATURDAY PICK-UP (Extra charge)
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12 [ ] HOLIDAY DELIVERY (If offered) (Extra charge)

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Total	Total	Total	

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3 ☐ Drop Box
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5 ☐ Station

FEDEX Corp. Employee No.

6 Date/Time for FEDEX Use

Emp. No.
☐ Cash Received
☐ Return Shipment
☐ Third Party
Street Address
City
Received By: X
Date/Time Received

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indemnify and hold h
claims resulting there

Release

84-485

FOLGER & LEVIN

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August 15, 1989

VIA FEDERAL EXPRESS

Kathryn E. Donovan
General Counsel
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Dear Ms. Donovan:

On behalf of our client, EIP Associates, Inc. (the "Firm"), and pursuant to Government Code Section 83114, we request that the Fair Political Practices Commission ("FPPC") provide written advice concerning an issue which has arisen for the Firm under the conflicts of interest provisions of the Political Reform Act of 1974, §§ 87100 - 87103 of the California Government Code (the "Act").

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At the recommendation of the City, the Developer retained the Firm several months ago to perform an initial site evaluation in connection with the Project. The purpose of the preliminary evaluation was to determine whether any problems exist that might pose an insurmountable obstacle to the Project. The preliminary study was completed by the Firm and paid for by the Developer in March, 1989. The Firm received $6,000 from the Developer for the site evaluation study. Prior to being engaged by the Developer to conduct the preliminary evaluation for the Project, the Firm had never done work for or been compensated by the Developer. No ongoing relationship exists between the Firm and the Developer and no additional sums are due the Firm by the Developer.

The Firm will be paid by the City for the EIR and its payment will not be dependent in any way on the results of the EIR or on whether or not the Project is ultimately developed.

You may assume for purposes of responding to this letter that the preparation of the EIR would be considered to be "participating in making" a "governmental decision" (a "Decision") within the meaning of Section 87100 of the Act.

In the Firm's discussions with the City, the City's attorney questioned whether the Firm or the Firm employees involved in preparing the EIR would be considered "public officials" as defined in Section 82048 of the Act, so as to raise a potential conflict of interest situation under the Act. Our analysis of the relevant provisions of the Act and the regulations promulgated thereunder (the "Regulations") leads us to conclude that there is no conflict of interest situation involved, with respect to either the Firm or such employees.

The only basis on which the Firm would be encompassed within the definition of "public official" under Section 82048 of the Act would be if it were considered a "consultant" of the City. We have concluded that the Firm would not be considered a "consultant" within the meaning of Section 82048, and hence not a "public official." Title 2, Section 18700(a)(2) of the Regulations defines "consultant" as including only "natural persons." The Firm is a corporation and therefore cannot be considered a consultant. Since the Firm is not a public official, it would not be subject to the conflict of interest rules under the Act.

We are aware from reviewing summaries of the FPPC's advice in similar factual settings that the Firm's employees who will be involved in preparing the EIR for the City may be considered "consultants" within the meaning of Section 18700 of the Regulations. (See FPPC letter to Anne M. Russell, of San Luis Obispo, dated February 17, 1989, File Number A-88-484.) We also understand from the advice given in FPPC File Number A-88-484 that (1) Firm employees with a ten percent or greater ownership interest in the Firm must disqualify themselves under the conflict of interest rules in the Act if the Decision may have a materially adverse effect on either the Firm or a Firm client, and (2) Firm employees with less than a ten percent ownership interest are required to disqualify themselves if the Decision may have a materially adverse affect on the Firm, but need not disqualify themselves for a Decision affecting Firm clients.

Only one of the employees of the Firm who will be involved with the preparation of the EIR for the City has an ownership interest in the Firm. That person owns five percent of the Firm's outstanding capital stock. It is thus our understanding that none of the Firm employees involved in the

preparation of the EIR for the City need disqualify himself or herself from preparing the EIR based on the effect the Decision may have on the Developer (a former Firm client).

We have also concluded that because there are no circumstances under which the Decision could have a materially adverse effect on the Firm itself, the 5% shareholder and other employees who will be involved in preparing the EIR need not disqualify themselves. The Firm will be paid the same fee by the City for preparing the EIR regardless of the findings of the EIR or whether or not the Project is developed. The Firm has been paid in full by the Developer for the preliminary evaluation work previously conducted and no other relationship exists between the Firm and the Developer with respect to the Project or otherwise. Thus, we have concluded that the Decision cannot have a materially adverse affect on the Firm.

We discussed the foregoing by telephone with Margaret Ellison, Esq. of your staff and understand that she agrees with the foregoing analysis. We respectfully request that your office provide written advice pursuant to Section 83114(b) to confirm our conclusion that neither the Firm nor the Firm employees to be involved in the preparation of the EIR need disqualify themselves under the conflict of interest rules of the Act.

If you require any additional information, please contact the undersigned. Thank you for your consideration.

Very truly yours,

Shi-Ling Hsu

SLH:lm
cc: Teressa K. Lippert, Esq.
Brent Barnes

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California
Fair Political
Practices Commission

August 21, 1989

Shi-Ling Hsu
Folger & Levin
Embrcadero Center West
275 Battery Street, 23rd Floor
San Francisco, CA 94111

Re: Letter No. 89-485

Dear Ms. Hsu:

Your letter requesting advice under the Political Reform Act was received on August 16, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John Wallace an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan

Kathryn E. Donovan
General Counsel

KED:plh